KHAN KAM CHEE

v.

LOKE WAN YAT REALTY SDN. BHD.

FEDERAL COURT, KUALA LUMPUR
ABDUL HAMID OMAR CJ (MALAYA)
WAN SULEIMAN FJ
EUSOFFE ABDOOLCADER FJ
[CIVIL APPEAL NO. 221 OF 1983]
8 AUGUST 1984

CONTRACT: *Agreement - Option to purchase - Partnership - Champerty - Rules of the High Court 1980, O. 33 r. 5.*

The appellant had entered into a written agreement on 21 March 1973 whereby the respondent in consideration of payment of RM2,000 by the appellant granted to him an option to purchase part of a certain piece of land at the price of RM6,160,000. The option was exerciseable within two months from the date of the contract and was renewable for a further period of two months on payment of a further sum of RM2,000. The agreement provided that on the exercise of the option a deposit of a sum of RM616,000 was to be paid immediately and the balance of the price was to be paid within six months from the date of the exercise of the option. The sum of RM2,000 being consideration for the grant of the option was paid to the respondent on 27 March 1973. On 9 April 1973 the respondent through its solicitors purported to repudiate the agreement and returned the said sum of RM2,000. The appellant refused to accept the repudiation and returned the sum to the respondent on 12 April 1973. On 18 May 1973 the appellant paid to the respondent a further sum of RM2,000 to extend the option for two months from 20 May 1973. On 12 July 1973 the appellant entered into a partnership agreement with a third party. On 17 July 1973 the appellant through solicitors informed the respondent's solicitors of his intention to exercise the option and on 19 July 1973 his solicitors paid to the respondent's solicitors the sum of RM616,000 as a deposit.

On 7 August 1973 the appellant filed a suit alleging that the respondent had breached the agreement by refusing to sell the land to the appellant and prayed for specific performance of the agreement and/or damages for breach of contract. On 25 March 1981 the appellant executed another agreement with the third party to determine their partnership agreement of 12 July 1973 whereby they were released from their respective obligations under the previous agreement.

The High Court dismissed the action on the hearing of preliminary issues raised in the statement of defence under O. 33 r. 5 of the Rules of the High Court 1980. The appellant appealed against the decision.

Held:

[1] That the partnership agreement entered into by the appellant and a third party on 12 July 1973 was a champerty.

[2] That the trial Judge gave the purported agreement between appellant and the respondent its proper significance.

[3] That by entering into the partnership agreement the appellant had divested himself of the right to litigate in favour of the partnership arising out of the latter agreement.

[Appeal dismissed with costs.]

Cases referred to:
Skelton v. Baxter [1916] 1 KB 321
Martell v. Consett Iron Co. Ltd [1955] 2 WLR 463
Laurent v. Sale & Co. [1963] 2 All ER 63
Varma & Anor v. Oli Mohamed [1950] MLJ 80
T. S. C. v. Director-General of Inland Revenue [1977] 2 MLJ 212

Legislation referred to:
Rules of the High Court 1980, O. 33 r. 5

For the appellant - G. S. Nijar (Peter Yip with him); M/s. Abdul Aziz, Ong & Co.
For the respondent - Cecil Abraham; M/s. Shearn Delamore & Co.

JUDGMENT

Wan Suleiman FJ:

This is an appeal from a decision of the High Court dismissing the action brought by the appellant/plaintiff on the hearing of preliminary issues raised in the statement of defence under O. 33 r. 5 of the Rules of the High Court, 1980.

In the Court below the appellant alleged that by a written agreement made on 21 March 1973 the respondent in consideration of the payment of RM2,000 by appellant granted to him an option to purchase part of the respondent's land Lot No. 1835, Town of Kuala Lumpur, at the price of RM6,160,000 approximately. The option was exercisable within two months from the date of the agreement and was renewable for a further period of two months on payment of further sum of RM2,000. The agreement provided that on the exercise of the option a deposit of a sum of RM616,000 was to be paid immediately, and the balance of the price was to be paid within six months from the date of the exercise of the option. The sum of RM2,000 being consideration for the grant of the option was paid to respondent on 27 March 1973.

On 9 April 1973 the respondent through its solicitors purported to repudiate the agreement and returned the said sum of RM2,000. The appellant refused to accept the repudiation and returned the sum to respondent on 12 April 1973. On 18 May 1973 he then paid to respondent a further sum of RM2,000 to extend the option for two months from 20 May 1973. On 17 July 1973 appellant through his solicitors informed respondent's solicitors of his intention to exercise the option, and on 19 July 1973 his solicitors paid to respondent's solicitors the sum of RM616,000 as a deposit. Appellant then alleged that the respondent had breached the agreement by refusing to sell the land to the appellant and he had returned all sums of money paid by him except the RM2,000 which it was holding on a claim against him, and prayed for specific performance of the agreement and/or damages for breach of contract.

For the respondent it was pleaded that the agreement was not legally enforceable.

For the purpose of this appeal we need only refer to para. 19 of the statement of defence which reads:

19. In the further alternative the defendant avers that the prosecution of this action in furtherance of the partnership agreement constitutes an abuse of the process of this Honourable Court and should be dismissed on the ground that it is against public policy.

The following further and better particulars were provided to the appellant on his request, by respondent:

1. The defendant avers that the sum of RM616,000 was not really tendered by or on behalf of the plaintiff at all, but on behalf of a partnership constituted by an agreement dated 12 July 1973 between the plaintiff and one Teh Seng Kian whereby all choses in action (if any which is denied in any event) allegedly vested in the plaintiff against the defendant and its directors was assigned by the plaintiff to the said partnership. These facts came to light after the trial of this action.

2. The defendant avers that by the said agreement the plaintiff had divested himself of any cause of action he may have had herein against the defendant and had assigned the same to the partnership between himself and Teh Seng Kian.

3. The plaintiff purports to bring this action against the defendant in his personal capacity and such action is an abuse of the process of this Court because the plaintiff has no *locus standi* or right to do so.

4. The defendant will aver that where an action is commenced by a partnership such action must be brought in the name of both the partners or not at all, and the omission of Teh Seng Kian's name is fatal to this action.

5. In the alternative the omission of Teh Seng Kian's name was by way of attempted concealment of a champertous arrangement leading to the creation of a cause of action against the defendant which the plaintiff would not otherwise have been able to manage on his own, being unable to complete.

6. The filing of an action to implement a champertous agreement is an abuse of process.

For the respondent (defendant in the Court below) it was urged that the partnership agreement (Exhibit P6) entered into by the appellant on 12 July 1973 was a champerty so that appellant's claim was not maintainable, following the English common law, which is applicable in this country by virtue of the Civil Law Act 1956. The learned Judge considered the sequence of events culminating in this action. That part of the judgment is set out hereunder in extenso:

> It is necessary to trace certain events which took place at about the time of the agreement of 21 March 1973 and thereafter. On 13 March 1973 the plaintiff as director of K.C. Khan & Co. wrote a letter (Exhibit D71) to the defendant offering to purchase the property in question at RM55 per sq. ft. and asking for an option. On 20 March 1973 the defendant gave a reply (Exhibit P2) to the plaintiff as Director of K.C. Khan & Co. stating the conditions for giving option and asking the plaintiff to sign at the bottom of that reply if he agreed to the conditions. On 21 March 1973 the plaintiff as director of K.C. Khan & Co. signed to signify that the conditions were agreed to. On 29 March 1973 the plaintiff signed a document (Exhibit P3) purportedly to be an agreement with the defendant. The recitals to this purported agreement read as follows:
>
> > Whereas the Owner has granted an option to the Option Holder to sell the piece of land held under C.T. 86672 for lot 1835 Section 41, Town and District of Kuala Lumpur excepting and reserving that part of the said land presently occupied by Odean Theatre and also used by it as road and car park and subject to the terms and conditions in the Option Agreement.
> >
> > And whereas pursuant thereto, the Option Holder has entered into advanced negotiations with his nominee (hereinafter called the Purchaser) to purchase the said property at the price referred to in the Option Agreement or at a higher price.

And whereas the Option Holder will shortly during the period of the option disclose the name of the Purchaser.

And whereas at the request of the Option Holder the Owner agrees to enter into a Sale and Purchase Agreement with the Purchaser on the terms contained in the Option Agreement or upon such terms and conditions as may be mutually agreed between the Owner and the Purchaser.

And whereas the Owner agrees to hold on trust for the Option Holder the amount over and above the option price paid by the Purchaser.

On 9 April 1973 Shearn Delamore & Co. as solicitors for the defendant wrote a letter (Exhibit P36) to Tan, Lim & Co. as Solicitors for the plaintiff, in which it was alleged that the option letter (Exhibit P2) was void and of no effect and request was made for the return of that option letter. On 12 April 1973 Tan, Lim & Co. sent a reply (Exhibit D21) to say that the plaintiff did not accept the defendant's repudiation of the option and that the plaintiff would sue if the defendant failed to honour the option. On 18 May 1973 the plaintiff wrote a letter (Exhibit P5) to the defendant sending another cheque of RM2,000 for the purpose of renewing the option for a further period of two months. On 12 July 1973 the plaintiff entered into an agreement (Exhibit P6) with Teh Seng Kian, wherein they agreed to enter into a partnership. On 18 July 1973 Skrine & Co. acting for the plaintiff wrote a letter (Exhibit P41) to Shearn Delamore & Co. to inform that a sum of RM616,000 has been deposited with them (Skrine & Co.) and that the plaintiff was ready and willing that the money be paid to the defendant in exercise of the option. On 7 August 1973 the plaintiff filed this suit. On 25 March 1981 the plaintiff and Teh Seng Kian executed another agreement (Exhibit D24) to determine their agreement of 12 July 1973 (Exhibit P6) whereby they were released from their respective obligations under the agreement of 12 July 1973.

After a consideration of the wording of Exhibit P6, he held it to be champertous. We agree with him.

Having in mind, no doubt, the decision in *Skelton v. Baxter* [1916] 1 KB 321, the learned Judge held that a party to a champertous agreement is not prevented from suing a third party on another agreement which is not champertous (in this case Exhibit P2) although the champertous agreement provides for assistance to the suing party to sue the third party on the other agreement. But on examining the evidence he decided that the plaintiff (appellant) had divested himself of the right to purchase and at the time he filed the writ he had no right to sue.

We note that Exhibit P3 was drawn up by Mr. Tan Ah Lak, a solicitor specially appointed by appellant's witness Toby Lam who was then also the Secretary of the respondent company, despite the fact that Messrs. Shearn Delamore & Co. were the regular solicitors. The recitals of this agreement set out in the judgment of the trial Judge should be examined in conjunction with the letter (Exhibit P27) which Toby Lam sent to Mr. Loke Wan Yat, executive director of the respondent company. This letter is set out below:

Toby Lam & Co.
CHARTERED ACCOUNTANT
CERTIFIED PUBLIC ACCOUNTANT (MALAYSIA)

TOBY C.H. LAM
(B.Sc, (Econs.) A.C.A.,
A.T.M., C.P.A. (M).

10th Floor,
Lee Yan Lian Building,
Jalan Mountbatten,
Kuala Lumpur.

Talipon : 22097 & 20740
29 March 1973.

Mr. Loke Wan Yat,
147, Lorong Kelawei,
Penang.

Dear Mr. Loke,

Land occupied by Lee Wong Kee and adjoining empty land

I enclose the following:

1. A photocopy of the option letter dated 20 March 1973.
2. A photocopy of the sketch plan of lot 1316, 1317 and that part of lot 1835 presently occupied by Odean Theatre and used as road and car park.
3. Three copies of the supplemental option agreement for your signature and return.

I have gone through the supplemental option agreement and have examined carefully that part concerning Odean Theatre in paragraph two which is in order. I have already appointed Mr. Tan Ah Lak as our solicitor as he has the **experience** and the **time** to go through the contracts. I have in fact spent several hours with him going through the contract. He has agreed with me that the supplemental contract is in order and in accordance with your wishes as stated in the option letter.

I have been made to understand that the option will be exercised and the deposit money will be paid within the next day or so. Meanwhile, please return the resolutions and the supplemental agreement for further action.

Sincerely,

Sgd.
Toby Lam.

Mr. Abraham suggests that the trial Judge had used P3 merely as an aid in construing the partnership agreement Exhibit P6, but the Judge obviously gave it more importance.

Three copies of Exhibit P3 were enclosed "for signature and return" and it seems to us that Toby Lam, after the assurances he gave in para. 3 thereof expected nothing less than their speedy return by Mr. Loke, duly signed. We cannot therefore see how the learned trial Judge could be said to be wrong in giving P3 its proper significance, treating it as he did, as a logical step between Exhibit P2 which entitled the purchase of the property by appellant himself, and P6 where the right became vested in the partnership.

The remaining two grounds, 5 and 6 concern two issues on which the learned trial Judge had found for the respondent. Firstly the Agreement P6 dated 12 July 1973 was champertous and secondly that by this agreement the appellant had divested himself of his right of action in favour of the partnership between himself and Teh Seng Kian, in consequence of which he himself was unable to sue, so that this suit was an abuse of the processes of the Court.

We agree with Mr. Abraham that those two issues are so interwoven as to require being dealt with together.

Mr. Nijar cited the case of *Martell v. Consett Iron Co. Ltd.* [1955] 2 WLR 463 at 491 as an authority for the proposition that illegal maintenance of the plaintiff in an action is no defence to the action. Learned Counsel also referred us to *Halsbury's Laws of England* 4th Edn., Vol. 9 para 404, as authority for the same proposition. Paragraph 404 reads:

404. Effect of the agreements involving maintenance. The fact that there is an agreement involving maintenance or champerty relating to an action provides no defence to that action, but where the plaintiff in the action is one who does not have an original title to the claim, the fact that the assignment of the claim to him constituted maintenance or champerty may be pleaded as a defence to the action.

We are unable to agree with Mr. Nijar that this is not an assignment of a cause of action but only the benefit. A reappraisal of the facts will make this clear.

On exercising the option Clause 7 required a deposit of RM616,000. The cause of action therefore arose only some time between 17 or 19 July when Messrs. Skrine & Co. on behalf of appellant, purported to exercise the option under Clause 7(b) (see p. 283, Exhibit P41), after the partnership agreement P6 had come into existence.

The vital issue is whether appellant could still sue on the option agreement Exhibit P2 or whether he had by entering into the partnership agreement Exhibit P6 divested himself of the right to litigate in favour of the partnership arising out of the later agreement. We are satisfied that as from the date of the signing of that agreement, 12 July 1973, he had indeed done so. The cause of action arose out of the deposit of 10% i.e. RM616,000 made under Clause 6 of Exhibit P6 and Clause 7 reads:

In the event of the vendor refusing or neglecting to accept the deposit for the said property or to complete the sale of the said property in accordance with the said option, the Option Holder shall forthwith commence legal proceedings against the Vendor or its director or directors as he may be advised.

The latter portion of para. 404 of the same volume of *Halsbury's Laws of England* earlier referred to reads, "...Where the plaintiff in the action is one who does not have an original title to the claim, the fact that the assignment of the claim to him constituted maintenance or champerty may be pleaded as a defence to the action." This proposition of law arose from the decision in *Laurent v. Sale & Co.* [1963] 2 All ER 63, the headnotes of which are as follows:

By documents of assignment in 1956, made in the French language but to which English law was declared to be applicable, K and M purported to assign to L their rights under letters dated 3 July 1953, addressed to K and M by the defendants, in which the defendants acknowledged irrevocable instructions to pay K and M respectively at stated figures against shipments of goods. Each document of assignment stated that the consideration for the assignment was to be the payment by L to K or M respectively, of a fraction of the total amount which should be paid to L by virtue of the letters of 3 July 1953. The assignments were made with the knowledge of both the parties to them that L would not be able to enforce claims under the letters unless he took legal proceedings against the defendants, and with the intention that L should take such proceedings.

In an action by L to enforce the claims assigned to him it was held that the assignment was void for champerty and L had no title to sue.

Megaw J said (at p. 65):

Counsel for the defendants has fairly pointed out that in the case of *Martell v. Consett Iron Co. Ltd (1),* it was held that the mere fact that an action was being maintained was not a defence. It might be a matter which would arise thereafter, but it could not be raised by way of defence to the action. In my view, the position is entirely different where the plaintiff in the action is one who does not have any original title in respect of the matter which he claims. He then has to show how he comes to the title to be plaintiff at all. That is an essential part of his cause of action. Here the step necessary to establish his title before

a he can begin to present the rest of his case is these two assignments from Marcelle and Kraus. If the point be taken by the defendants, as it has been taken here, that those assignments are champertous agreements, then, in my view, that is a matter which can properly be taken by way of defence and has to be considered by the Court as part of the defence, in the same way as any other defects, that might be alleged in the assignment on which a plaintiff had to rely to show his title, might be raised by way of defence.

b The mere fact that champerty, if it exists, is illegal and, indeed, can be criminal, is certainly not a reason for refusing to consider it as part of the defence to an action where, if the agreement is champertous and illegal, it destroys a necessary step in the plaintiff's title to the action. I am therefore satisfied that the decision in *Martell v. Consett Iron Co. Ltd (1*) is not a bar to the course, which has been taken here, of pleading in the defence that this is a champertous agreement. Accepting as I do the four propositions (2) put forward by Counsel on behalf of the defendants, it follows that I decide this issue in favour of the c defendants.

The last of the four propositions referred to by Megaw J as being part of defence Counsel's submission was that it was immaterial in the case of champertous assignment which of the parties to it had become plaintiff in the action. Thus if K and M, instead of L had sued (i.e., were plaintiffs), the same defence would have succeeded. Similarly, in the instant appeal the partnership of appellant and Teh formed under the agreement P6 would be in the position of d L, had it sued respondents could have been successfully met with the same defence. Appellant, suing on his own, would be in a much weaker position because having divested himself of the right to sue in his own capacity, he could not hope to succeed in any action which in effect is on behalf of the partnership and on the strength of the champertous partnership agreement.

e Quite apart from the question of champerty we are satisfied after considering the chronology of events that after the signing of the agreement P6 on 12 July 1973, appellant filed his action on 7 August 1973. Having divested himself of the right to sue in his personal capacity he was the wrong plaintiff - see *Varma & Anor. v. Oli Mohamed* [1950] MLJ 80. This would be so even if the Exhibit P3, the agreement which respondent had allegedly agreed to enter into but subsequently changed his mind, is not taken into account. We f agree with Mr. Abraham that even if Exhibit D24 amounts to a reassignment, then his right to sue in his personal capacity would arise only on 25 March 1981. By then, he would have been time-barred.

We would therefore dismiss the appeal with costs here and below.

We should perhaps refer briefly to the cross-appeal by the respondent, on the ground that g Mr. Khan's activity constituted a business, and non-registration of the prescribed particulars would, by virtue of s. 8 of the Registration of Businesses Act, 1956, Revised 1978, debar him from enforcing his rights under the contract by suit or any other legal proceeding.

In support, Mr. Abraham cited the case of *T.S.C. v. Director-General of Inland Revenue* [1977] 2 MLJ 212 the facts of which we note have no relevance or application to the h facts of the appeal before us.

Counsel very properly intimated that he was not pressing his cross-appeal. We find no merit in the cross-appeal and accordingly dismiss it with costs.

Also found at [1984] 2 CLJ 154

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